

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: CS/CS/SB 1844

INTRODUCER: Governmental Oversight and Accountability Committee, Commerce Committee, and Senator Bennett

SUBJECT: Administrative Procedures

DATE: April 21, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Pugh</u>	<u>Cooper</u>	<u>CM</u>	<u>Fav/CS</u>
2.	<u>McKay</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	<u> </u>	<u> </u>	<u>WPSC</u>	<u> </u>
4.	<u> </u>	<u> </u>	<u>RC</u>	<u> </u>
5.	<u> </u>	<u> </u>	<u> </u>	<u> </u>
6.	<u> </u>	<u> </u>	<u> </u>	<u> </u>

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill makes a number of changes in the Administrative Procedure Act to:

- Require agencies to prepare statements of regulatory costs (SERCs) and economic analyses for certain proposed rules, amended rules, and rule repeals;
- Stay the implementation of rules that trigger economic-development thresholds until the Legislature has had an opportunity to review them;
- Give substantially affected persons more time to review rules and submit lower-cost regulatory alternatives to the agencies; and
- Require ratification by the Legislature before certain rules could take effect.

This bill substantially amends ss. 120.54 and 120.541, F.S.

II. Present Situation:

The Administrative Procedure Act

Because administrative agencies have been granted extensive investigative, rulemaking, and adjudicating powers, statutes such as the Florida Administrative Procedure Act (APA) have been adopted to provide parties in administrative proceedings with procedural protection and due process.¹ The APA allows individuals who feel that their interests are being or will be affected by the preliminary decisions of agencies to challenge those decisions.² The central purpose of the APA is to provide the basic fairness that should surround all governmental activity, such as:

- The opportunity for adequate and full notice of agency activities;
- The right to present viewpoints and to challenge the views of others;
- The right to develop a record which is capable of court review;
- The right to locate precedent and have it applied; and
- The right to know the factual bases and policy reasons for agency action.³

The Division of Administrative Hearings (DOAH), which consists of an independent group of administrative law judges (ALJs), conducts hearings under ch. 120, F.S., when certain agency decisions, e.g., rules and determinations of a party's substantial interest, are challenged by substantially affected persons.⁴ Proceedings by DOAH are conducted like nonjury trials and are governed by ch. 120, F.S.⁵

Analysis of Regulatory Costs

As part of the administrative rulemaking process, agencies may develop a statement of estimated regulatory costs (SERC) for its rules that must include:⁶

- A good-faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule;
- A good-faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues;
- A good-faith estimate of the transactional costs likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the rule;
- An analysis of the impact on small businesses, small counties, and small cities;
- Additional information that the agency determines may be useful; and

¹ 2 FLA. JUR 2D *Administrative Law* s. 1 (2007).

² Judge Linda M. Rigot, *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, 75 FLA. B.J. 14, 14 (2001); *see also* 2 FLA. JUR 2D *Administrative Law* s. 5 (2007).

³ 2 FLA. JUR 2D *Administrative Law* s. 5 (2007) (*quoting Singer Island Civic Ass'n, Inc. v. State Dep't of Environmental Regulation*, 636 So. 2d 723, 725 (Fla. 4th DCA 1994)).

⁴ Rigot, *supra* note 2, at 14.

⁵ *Id.*

⁶ Section 120.541(2), F.S.

- If applicable, a description of any good-faith written proposal submitted for a lower cost regulatory alternative to a proposed rule that substantially accomplishes the objective of the law being implemented, and the agency's response to the alternative.

An agency is encouraged to prepare a SERC prior to the adoption, amendment, or repeal of any rule other than an emergency rule. A SERC affecting small businesses, however, must be prepared by an agency and must not be limited to only those proposed rules that have an adverse impact on small business, but done on any rule that affects a small business.

Any substantially affected person,⁷ or Small Business Regulatory Advisory Council (SBRAC),⁸ may submit a written proposal for a lower cost regulatory alternative. Once submitted, an agency is required to prepare a SERC or revise an existing one. The agency must adopt the alternative or give reasons for rejecting it. The agency's failure to prepare or revise a SERC is considered a material failure to follow rulemaking procedures.

Chapter 120, F.S., includes a number of deadlines⁹ for agency publication of proposed rules, or modifications to or repeal of rules; for filing a lower cost regulatory alternative; and for filing a challenge to a proposed rule or agency action based on the imposition of regulatory costs to the substantially affected person, small business, or local government.

Rules Relating to Small Business

Pursuant to s. 288.703(1), F.S., "small business" means any independently owned and operated business enterprise that employs 200 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than \$5 million or any firm based in Florida with a Small Business Administration 8(a) certification. For sole proprietorships, the \$5 million net worth requirement includes both personal and business investments.

However, for purposes of the APA, an agency may define a "small business" as having more than 200 employees if that is necessary to more fully evaluate whether a rule has broad discriminatory impacts on certain industries.

Each agency, before the adoption, amendment, or repeal of a rule, is required to consider the impact of the rule on a small business and a SERC must be prepared. Under the current law:

- An agency is required to provide the SBRAC and the Governor's Office of Tourism, Trade, and Economic Development (OTTED) with notice of a proposed rule that affects small businesses 28 days prior to its adoption.
- SBRAC has 21 days after it receives notice of a rule in which to review the impact of that rule on small businesses and offer alternatives to lessen the identified impact.
- If SBRAC offers a small-business alternative, the time limit for adopting the rule is extended 21 days, within which time the agency must consider the alternative, revise its statement of estimated regulatory costs as necessary, and accept or reject the alternative.

⁷ Section 120.541(1), F.S.

⁸ Section 120.54(3)(b)2.b.(II), F.S.

⁹ Section 120.541(1)(c), F.S.

- If an agency does not adopt the SBRAC alternative, it must, prior to rule adoption or amendment, file a detailed written statement with the Joint Administrative Procedures Committee (JAPC) and SBRAC explaining the reasons for failure to adopt the alternatives.¹⁰
- SBRAC may request the President of the Senate and the Speaker of the House of Representatives to direct the Office of Program Policy and Government Accountability (OPPAGA) to determine whether the rejected alternatives reduce the impact on small businesses and still meet the stated objectives of the proposed rule.
- Within 60 days after the presiding officers request OPPAGA to evaluate these issues, OPPAGA must report its findings to JAPC. It also must submit a report of its findings and recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives.
- JAPC formally reports OPPAGA's findings to the agency, which must respond in writing to JAPC why it still does not want to adopt the SBRAC alternatives.

Joint Administrative Procedures Committee

Within the APA, the responsibility of the Legislature's Joint Administrative Procedures Committee (JAPC) is delineated.¹¹ As a check on legislatively created authority, JAPC examines every proposed rule, unless exempted by law, and may examine existing rules to make certain determinations. Each proposed rule, rule modification, or rule repeal is evaluated by JAPC using the following guidelines:

- Is the rule an invalid exercise of delegated legislative authority;
- Has the statutory authority for the rule been repealed;
- Is it in proper form, was proper notice given and was it adequate for the purpose and effect of the rule;
- Is it consistent with expressed legislative intent;
- Is it a reasonable implementation of the law as it affects persons impacted;
- Is it necessary to implement the law cited;
- Could regulatory costs on the regulated persons, county, or city impacted by the rule be reduced by adoption of a less costly alternative;
- Could the rule be made less complex or more easily understandable by the general public;
- Does the rule require an additional appropriations; and
- If an emergency rule, is the emergency status justified.¹²

If after review of a proposed rule and any information required from an agency, JAPC objects to the rule, it has 5 days to certify the objection to the agency along with its detailed concerns. JAPC also notifies the President of the Senate and the Speaker of the House of Representatives of its concerns.¹³

¹⁰ Section 120.54(3)(b), F.S.

¹¹ Section 120.545, F.S.

¹² See s. 120.545(1), F.S.

¹³ See s. 120.545(2), F.S.

Within 30 to 45 days of receipt of the objection, an agency, depending upon its structure, must do the following:

- If the rule is not in effect, it must notice modifications of the rule that address JAPC's concerns or withdrawal of the rule, or notify JAPC that it refuses to do either.
- If the rule is in effect, it must notice to amend the rule to address JAPC's concerns or to repeal the rule, or to notify JAPC that it refuses to do either.
- If the objection is with the SERC, the agency must prepare a corrected SERC, notice it, and send a copy to JAPC, or notify JAPC that it will not comply.¹⁴

If an agency refuses to respond within timeframes required for a proposed rule, the rule is considered withdrawn. Any other lack of response is considered a refusal to take action by the agency.¹⁵

If JAPC objects to a rule, or portion of a rule, and the agency does not begin administrative action consistent with the objection within 60 days after objection or fails to proceed in good faith to complete the action, JAPC makes recommendations for changes in the law, if determined necessary. Those recommendations for change, if any, are presented as legislation to come before the Senate or House of Representatives for consideration just as are other issues.¹⁶

An agency is notified of JAPC's vote to introduce legislation. JAPC may request the agency to temporarily suspend the rule or its adoption, pending consideration of proposed legislation during the next regular session of the Legislature.¹⁷ An agency has up to 45 days to respond to JAPC's request to suspend the rule or its adoption. Failure of the agency to respond is considered a refusal to act. Nothing prevents an agency from refusing to take action as requested by JAPC.¹⁸

If legislation addressing the objections fails to become law, the temporary rule suspensions by an agency expire.¹⁹

The Small Business Regulatory Advisory Council

Created in 2008,²⁰ the Small Business Regulatory Advisory Council (SBRAC) is an advisory body with primary responsibilities to:

- Advocate for small businesses in Florida;
- Evaluate agency rules for their impact on small businesses and offer alternatives that accomplish the same goals with less adverse impacts on small businesses;
- Participate in the Agency Sunset Review process in s. 11.905, F.S.; and
- Develop a "Small Business Friendliness and Development Scorecard" that rates state agency rules.

¹⁴ See s. 120.545(3)(c), F.S.

¹⁵ See s. 120.545(4), (5), and (6), F.S.

¹⁶ See s. 120.545(8), F.S.

¹⁷ See s. 120.545(8)(b)1., F.S.

¹⁸ Section 120.545(8)(b)2., F.S.

¹⁹ Section 120.545(8)(d), F.S.

²⁰ Created by passage of ch. 2008-149, L.O.F. (See s. 288.7001, F.S.) More information is available at the website, <http://floridasbrac.org>.

SBRAC has nine board members consisting of private citizens who are current or former small-business owners, three each appointed by the Governor, the President of the Senate, and the Speaker of the House of Representatives. SBRAC currently has three full-time staff and two part-time interns and is housed administratively within the Florida Small Business Development Center Network, based in Pensacola at the University of West Florida. For FY 09-10, SBRAC received \$250,000 in state general revenue for its operations.

According to information compiled by SBRAC and presented before legislative committees earlier this year:²¹

- Since January 2009, when SBRAC began meeting, more than 1,200 proposed or modified rules have been published in the Florida Administrative Weekly;
- SBRAC has formally reviewed and discussed 130 sets of rules;
- SBRAC has formally requested agencies to adopt lower-cost regulatory alternatives to 17 proposed rules; and
- Agencies have declined SBRAC's recommended alternatives on 11 rules.

In those legislative presentations, SBRAC has expressed three issues of concern:²²

- Not all state agencies are aware of SBRAC's responsibilities or the requirement that agencies must prepare SERCs, using current and relevant economic data, for proposed rules that adversely impact small businesses;
- The 21-day rule review period SBRAC operates under to review rules; and
- The need for state appropriations to SBRAC for staffing, travel, and other operational expenses so that it can meet its statutory responsibilities.

The SBRAC and the Office of the Small Business Advocate were created to represent Florida's small-business community. According to information reported by SBRAC in 2009:²³

- More than 99 percent of Florida's businesses – or 1.94 million enterprises – are small businesses.
- Of that number, 1.52 million are self-employed individuals and 426,073 are businesses that employ fewer than 500 workers.
- Florida has an estimated 4,356 businesses with more than 500 employees.
- Small employers created nearly 60 percent of all net new jobs in Florida.

III. Effect of Proposed Changes:

The bill makes a number of significant changes to ch. 120, F.S., related to when agencies must prepare SERCs; what information those SERCs must evaluate; the Legislature's role in reviewing and acting on proposed rules that impact economic-development issues; and how much time persons substantially affected by a rule have to review it and to submit an alternative.

²¹ PowerPoint presentation available at <http://www.floridaosba.org/GenDocs/012010/Attkisson%20Presentation%20012010.pdf>.

²² Ibid.

²³ Information available at <http://floridaosba.org/GenDocs/102009/101609%20Issues%20%20Recommendations.pdf>.

Section 1 amends s. 120.54, F.S., to require agencies to prepare SERCs on any proposed rule that either has an *adverse* impact (rather than *any* impact, as in current law) on small business, or is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate in Florida. Although undefined, “private-sector” can be construed to mean any Florida business enterprise, so the number of agency rules for which SERCs will be required will increase.

The bill amends s. 120.54(4)(c), F.S., to provide that emergency rules are only effective for 90 days and not renewable unless the agency has initiated rulemaking on the subject of the emergency rule and either:

- A filed challenge to the proposed rules remains pending; or
- The proposed rules are awaiting ratification by the Legislature;

Section 2 amends s. 120.541, F.S., to make a number of changes, such as extending certain deadlines, establishing thresholds for SERC review, and involving the Legislature in reviewing and acting on proposed rules. It deletes or rearranges existing provisions related to when a rule may be declared invalid to reflect the changes to this section of law.

The new language in s. 120.54, F.S., (in **Section 1** of the bill) is repeated in this section. Additionally, an agency would be required to revise its SERC if any further change to the proposed rule increases regulatory costs. At least 45 days before filing a proposed rule for final adoption, an agency must provide a copy of its revised SERC to the person who submitted the lower cost regulatory alternative and provide notice on its website that the document is available to the public.

An agency that fails to prepare or revise a SERC pursuant to these new conditions has committed a material failure to follow the state’s rulemaking procedures. However, this does not mean that the proposed rule that should have been the subject of the new or revised SERC is automatically declared invalid, unless:

- The issue is raised in an administrative proceeding within 1 year after the rule’s effective date, and
- The agency’s failure to prepare or revise a SERC materially affects the substantial interests of the person challenging the rule.

Additionally, any rule that is challenged by a substantially affected person because it is an “invalid exercise of delegated legislative authority”²⁴ imposing regulatory costs on a regulated person, city, or county that could be reduced by a lower cost alternative, may not be automatically declared invalid unless:

- The issue is raised in an administrative proceeding within 1 year after the rule’s effective date;
- The challenge is to the agency’s rejection of a lower-cost regulatory alternative pursuant to s.120.541(1)(a), F.S.,²⁵ or under s. 120.54(3)(b)2.b., F.S., related to notification to SBRAC and OTTED that the proposed rule impacts small businesses; and
- The substantial interests of the person challenging the agency on its proposed rule are materially affected by the rejection of the lower cost alternative.

²⁴ Section 120.52(8)(f), F.S.

²⁵ As revised in this legislation, CS/SB 1844.

Section 120.541(2)(a), F.S., is amended to require SERCs to include an economic analysis of whether the proposed rule, directly or indirectly:

- Is likely to have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment in excess of in excess of \$1 million in the aggregate;
- Is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in Florida to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of \$1 million in the aggregate; or
- Is likely to increase regulatory costs, including any transactional costs, in excess of \$1 million in the aggregate.

The agency's analysis of the impact on small businesses must include the basis for the agency's decision not to implement alternatives that would reduce adverse impacts on small businesses.

Emergency rules adopted pursuant to s. 120.54(4), F.S., or federal standards adopted pursuant to s. 120.54(6), F.S., are exempt from this new economic analysis component of the SERC.

A new subsection (3) is created in s. 120.541, F.S., to require that any proposed rule which has an impact or regulatory costs in excess of the criteria listed above may not go into effect until it is ratified by the Legislature.

Section 3 amends s. 120.56(2)(a), F.S., to allow a person substantially affected by a proposed rule to challenge the rule within 44 days after the SERC or revised SERC has been prepared and made available.

Section 4 amends s. 120.60(1), F.S., to provide that an agency may establish by rule the time period for submitting any additional information requested by the agency related to licensing. For good cause shown, the agency must grant a request for an extension of time for submitting the additional information. If the applicant believes the agency's request for additional information is not authorized by law or rule, the agency, at the applicant's request, must proceed to process the application.

Section 3 provides this act takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Indeterminate. Depending on how the term “private sector” is eventually defined, state agencies may see an increase in work load due to preparation or revision of SERCs. It also may make agency rulemaking more expensive, by requiring economic analysis of certain types of rules for which many agencies may not have staff expertise.

Delaying implementation of rules could have fiscal impacts on agency budgets and operations if:

- a 90-day extension for rules where a lower-cost regulatory alternative has been submitted; or
- the Legislature must have the opportunity to review it.

VI. Technical Deficiencies:

The bill appears to create overlapping or contradictory deadlines for some of the SERC-related activities in the legislation, when compared to other deadlines in the rest of ch. 120, F.S.

For example, s. 120.54(3)(b)2.b., F.S., has a number of deadlines specifically relevant for SBRAC and its responsibilities related to working with agencies on their rulemaking, filing lower cost regulatory alternatives, and asking the Legislature for assistance from OPPAGA to evaluate an agency-rejected alternative. It is unclear how these current time-frames for SBRAC action mesh with those for “substantially affected persons,” or whether SBRAC can take advantage of the additional 90 days until a proposed rule can be filed for final adoption if it submits a lower cost regulatory alternative.

Also, it is unclear what impact the time delays created in the bill will have on the administrative hearing process for rule challenges that aren’t related to SERC deficiencies or the triggering of economic-development thresholds.

There appears to be a misplaced modifier on lines 235 and 240. The phrase “in excess of \$1 million in the aggregate” appears to modify “impact,” and would be better placed immediately after that word.

VII. Related Issues:

The bill does not define the terms “private sector” or “adverse economic impact.” “Adverse economic impact,” if interpreted to include indirect costs, could apply to virtually any rule that imposes regulation.

The bill requires that certain agency rules may not take effect unless ratified by the Legislature. Though the Legislature occasionally requires that rules be presented for review, the default in such provisions is that the rules take effect if the Legislature takes no action otherwise.²⁶ It is also unclear what particular act constitutes the submittal to the Legislature, or who does the submitting.

An earlier version of this bill provided that if a substantially affected person submits a written, good-faith lower cost regulatory alternative to a proposed rule, then the current 90-day window for the agency to file for formal adoption of that rule is extended an additional 90 days, replacing the current 21-day extension. This should give the agency more time to evaluate the alternative, either revise its SERC or fully develop its position on why it prefers its proposed rule, or begin efforts to revise the proposed rule. While substantially affected parties also would have more time to work with agencies to revise proposed rules, it is unclear whether SBRAC also would be given more time to work with agencies on rules that impact small businesses.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes: (Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability Committee on April 20, 2010:

- Requires agency preparation of a SERC when a proposed rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate in Florida;
- Provides that emergency rules are only effective for 90 days and not renewable unless the agency has initiated rulemaking on the subject of the emergency rule and either:
 - A filed challenge to the proposed rules remains pending; or
 - The proposed rules are awaiting ratification by the Legislature;
- The economic analysis required in a SERC must show whether the rule directly or indirectly is likely to increase regulatory costs; the analysis need not show whether the rule expands the growth of state government;
- Requires an agency to include any costs of complying with the proposed rule in its economic analysis;
- Requires an agency’s impact analysis for small businesses to include the basis for the agency’s decision to not implement alternatives that would reduce adverse impacts on small businesses;
- Provides that proposed rules that exceed certain criteria cannot take effect unless ratified by the Legislature;
- Changes from 20 to 44 days the time period in which a substantially affected person may challenge a proposed rule after a SERC has been prepared or revised; and

²⁶ See s. 163.3177(9), F.S.

- Provides that an agency may establish by rule the time period for submitting additional materials for license applications.

CS by the Commerce Committee on April 7, 2010:

- Expands the provisions relating to the required Statement of Regulatory Costs (SERCs) for rules affecting small businesses to include any rule with an adverse economic impact of over \$200,000 on the private sector in Florida;
- Omits the proposed requirement that agencies retain an independent entity to conduct the economic analysis to determine the impact of the proposed rule, and that the analysis be verified by the Legislative Office of Economic and Demographic Research;
- Includes additional impact issues to be evaluated in the economic analysis; and
- Exempts rules adopting federal standards from the required economic analysis portion of the SERC.

B. Amendments:

None.